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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 CHARLA ROMANS,

Civil No. 06-1331-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
14 Commissioner of Social Security
Administration; and The Social
Security Administration,

15 Defendants.
16

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18 Columbia Business Center, Suite 235
Portland, Oregon 97223
19 Attorney for plaintiff

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21 District of Oregon
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24 Attorneys for defendants

25 AIKEN, Judge:

26 Defendants move to dismiss counts two and three
27 of plaintiff's complaint. That motion is granted.

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BACKGROUND

Plaintiff brings three counts against defendants. The first count is a traditional challenge pursuant to the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and 1383(c)(3), to obtain judicial review of a final decision of the Commissioner denying her application for Supplemental Security Income (SSI) disability benefits under Title XVI of the Act. The second count alleges that defendants "failed, neglected and refused" to respond favorably to plaintiff's request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for "all letters, memos, or other writings, however described, including those stored in computer memory, discussing the number of jobs issue that arises at step 5 of sequential evaluation." First Amended Complaint, p. 2, ¶¶ 7-8. Count three alleges that defendants violated plaintiff's constitutional rights "by pretending to or actually relying on Vocational Expert testimony about numbers of jobs that defendants know or should know to be unreliable, in violation of plaintiff's Fifth Amendment right to substantive due process and/or plaintiff's Ninth Amendment right to a government that is honest in fact and reasonably competent at what it undertakes to do." *Id.* at p. 3, ¶ 10(a).

Defendants move to dismiss counts two and three alleging failure to state a claim upon which relief can be granted and lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

STANDARDS

Under Fed. R. Civ. P. 12(b)(6), dismissal for failure to state a claim is proper only when it appears to a certainty that

1 the plaintiffs can prove no set of facts in support of their
2 claim that would entitle them to relief. Litchfield v.
3 Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984), cert. denied, 470
4 U.S. 1052 (1985). For the purpose of the motion to dismiss, the
5 complaint is liberally construed in favor of the plaintiffs, and
6 its allegations are taken as true. Rosen v. Walters, 719 F.2d
7 1422, 1424 (9th Cir. 1983).

8 In deciding Rule 12(b)(1) jurisdictional attacks, this
9 court may consider matters outside the record in determining
10 whether it has subject matter jurisdiction. Sammattino v. United
11 States, 255 F.3d 708 (9th Cir. 2000).

12 DISCUSSION

13 Plaintiff's counsel (counsel) initially filed eight
14 separate lawsuits on behalf of individuals against defendant
15 challenging the Secretary's denial of disability benefits under
16 the Act. Each of these lawsuits also contain counts identical to
17 counts two and three quoted above.

18 I. Count Two - FOIA Violation

19 The FOIA requests submitted to the agency by counsel
20 identified each client by name and social security number and
21 were reasonably interpreted by the Division Director in the
22 Office of Public Disclosure (OPD) of the Social Security
23 Administration (SSA) as requesting information specifically
24 regarding a named client in each letter and his or her denial of
25 disability benefits. See Defendants' Ex. A. Further, the
26 Division Director, Ethel Burrows, declares that the agency
27 interpreted counsel's request as seeking information relating to
28 the administrative law judge's decision in plaintiff's case. The

1 OPD responded to counsel's request by stating that the Office of
2 Appeals Operations would send him a copy of the exhibits and a
3 copy of the hearing tape, which would contain the information he
4 requested. See Defendants' Ex. B. The Office of Appeals
5 Operations then sent counsel the specified exhibits and copy of
6 the hearing tape. See Defendants' Ex. C. Burrows declared that
7 she contacted counsel to "clarify what types of documents he was
8 seeking in these requests." Declaration of Ethel Burrows, p. 3.
9 Burrows was told by counsel's assistant that she had been
10 instructed "to send Freedom of Information Act requests to SSA on
11 behalf of individual clients at the same time a request for
12 review was sent to the Appeals Council." Id. Burrows asked
13 counsel to contact her to discuss his requests. Counsel did not
14 do so. Id.

15 Subsequently, the Office of Appeals Operations was informed
16 by an individual in counsel's office that counsel was not seeking
17 copies of exhibits and the hearing tape in response to his FOIA
18 request, but was instead seeking working papers from the Office
19 of Appeals Operations. Based on that information, the OPD then
20 sent a letter to counsel stating that because the Appeals Council
21 had not yet taken action on the request for review in his
22 client's case, no records were currently available. Counsel's
23 request for working papers was denied, and counsel appealed the
24 denial of his FOIA request. In counsel's appeal, he clarified
25 for the first time that he was not seeking working papers from
26 the Office of Appeals Operations, nor was he seeking
27 documentation specific to an individual claimant. Instead,
28 counsel stated that he was requesting letters, memoranda and/or

1 other documents regarding generally the use of vocational expert
2 testimony at step five of the sequential evaluation process.

3 Based on this information, the OPD informed counsel that
4 because he clarified that he was seeking policy or procedural
5 documents rather than specific records pertaining to claimants,
6 the OPD was closing all of counsel's current requests and
7 appeals. The agency also stated that counsel's clarified request
8 would be processed as a new initial request rather than as an
9 appeal. There is no dispute that the OPD is currently processing
10 counsel's clarified request for policy and procedural documents
11 and that all new letters from counsel requesting this information
12 are being processed as part of the pending, consolidated request.

13 Based on the evidence before this court, I find that
14 plaintiff has failed to exhaust all administrative remedies.
15 Specifically, I find that count two is premature and therefore
16 dismissed. There is no dispute that counsel's clarified FOIA
17 request is currently pending with the agency. Further, neither
18 the parties nor the court know what records may or may not exist
19 in response to that request. Jurisdiction of the District Court
20 for a FOIA complaint is predicated on an agency withholding all
21 or part of the requested records. 5 U.S.C. § 552(a)(4)(B).
22 Because no records have yet to be withheld from counsel, it is
23 premature for this court to litigate counsel's assertion of a
24 FOIA violation. I find this court lacks subject matter
25 jurisdiction over count two.¹

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27 ¹ Further, I find that the mandamus statute does not provide
28 this court with jurisdiction, 28 U.S.C. § 1361. See Patel
v. Reno, 134 F.3d 929, 931(9th Cir. 1997) (claim must be clear
and certain; officer's duty is ministerial and so plainly

1 II. Count Three - Constitutional Violations

2 Count Three alleges:

3 On 3/23/05 and 8/17/05, the defendants caused two
4 ALJ hearings to occur on plaintiff's Social Security
 Disability case.

5 On these occasions, plaintiff alleges on information
6 and belief, that defendants failed[,] neglected and
7 refused to uphold plaintiff's constitutional rights
 as follows:

8 (a) By pretending to or actually relying on Vocational
9 Expert testimony about numbers of jobs that defendants
10 know or should know to be unreliable, in violation
11 of plaintiff's Fifth Amendment right to substantive
 due process and/or plaintiff's Ninth Amendment right
 to a government that is honest in fact and reasonably
 competent at what it undertakes to do.

12 Amended Complaint, ¶¶ 9-10.

13 Plaintiff alleges violation of her Ninth Amendment right
14 "to a government that is honest in fact and reasonably competent
15 at what it undertakes to do." Id. at ¶ 10(a). I do not find
16 this phrase to be a "short and plain statement of the claim
17 showing that the pleader is entitled to relief." Fed. R. Civ. P.
18 8(a)(2). Further, the Ninth Amendment does not independently
19 secure a constitutional right for purposes of pursuing a civil
20 rights claim. Strandberg v. City of Helena, 791 F.2d 744 (9th
21 Cir. 1986). Moreover, federal court jurisdiction exists only if
22 there is an actual case or controversy. Allen v. Wright, 468
23 U.S. 737 (1984). Plaintiff's asserted Ninth Amendment violation
24 fails to state any such case or controversy. Therefore,
25 plaintiff's Ninth Amendment claim is dismissed.

26 Plaintiff next alleges that her Fifth Amendment right to

27 _____
28 described as to be free from doubt; and no other adequate
 remedy is available).

1 "substantive due process" was violated by the use of Vocational
2 Expert (VE) testimony. Plaintiff seems to assert that the ALJ's
3 reliance on the VE testimony regarding the number of jobs
4 existing in the national economy is a violation of plaintiff's
5 substantive due process rights.

6 The Ninth Circuit has clearly ruled that the ALJ's reliance
7 on VE testimony regarding the number of relevant jobs in the
8 national economy is warranted. Bayliss v. Barnhart, 427 F.3d
9 1211 (9th Cir. 2005). Specifically, an ALJ may take
10 administrative notice of any reliable job information including
11 information provided by a VE. Nonetheless, plaintiffs and their
12 counsel are permitted to challenge that testimony, including
13 questioning the foundation of an opinion and any conclusions
14 drawn from that opinion. Notably here, plaintiff does not allege
15 that her ability to challenge that testimony was in any way
16 thwarted or denied.

17 Moreover, plaintiff fails to point to the deprivation of
18 any fundamental liberty interest. See Washington v. Glucksberg,
19 521 U.S. 702, 721 (1997) (requiring a careful description of the
20 asserted fundamental liberty interest for the purpose of a
21 substantive due process analysis).

22 I find no basis for a colorable due process constitutional
23 claim. Plaintiff's alleged constitutional violation rests on an
24 objection to evidence that has been examined by the Ninth Circuit
25 and ruled admissible. Moreover, the complaint fails to set forth
26 facts to support any deprivation of an opportunity to be heard.
27 Plaintiff does not allege, nor is there evidence in the record
28 before this court suggesting that plaintiff was deprived of the

1 opportunity to cross examine the VE, submitted other data or
2 evidence regarding the number of jobs in the national economy, or
3 moved to suppress the evidence. The complaint, in fact, alleges
4 that plaintiff appeals from a final agency decision, that there
5 were two hearings before an ALJ, and that plaintiff challenges
6 the conclusions and findings of fact made by the ALJ.
7 Plaintiff's additional allegation that the VE testimony regarding
8 numbers of jobs is "unreliable" does not rise to the level of a
9 due process constitutional claim. Plaintiff's count three claim
10 is therefore dismissed.

11 **CONCLUSION**

12 Defendants' motion to dismiss counts two and three (doc.
13 12) is granted. Further, defendants' request for oral argument
14 is denied as unnecessary.

15 IT IS SO ORDERED.

16 Dated this 16 day of May 2007.

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20 Ann Aiken
21 United States District Judge
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